

## REMARKS

The claims have been amended to more precisely define the invention and advance the application to issue. No new matter has been added.

In the office action claims 1-4 were allowed.

In the office action claims 5 and 10 were rejected under 35 USC 102 as being clearly anticipated by Green (US6,481,344)

The federal circuit has held that prior art is anticipatory only if every element of the claimed invention is disclosed in a single item of prior art in the form literally defined in the claim. *Jamesbury corp. v. Litton Indus. Products*, 756 F.2d 1556, 225 USPQ 253 (Fed. Cir. 1985); *Atlas Powder Co. v. du Pont*, 750 F.2d 1569, 224 USPQ 409 (Fed. Cir. 1984); *American Hospital Supply v. Travenol Labs.*, 745 F.2d 1, 223 USPQ 577 (Fed. Cir. 1984).

It is respectfully submitted that the application as amended is improperly rejected for want of a prima facie showing of anticipation. Every element of applicant's invention as herein claimed in amended form is not disclosed in the cited item.

What Green teaches, and claims is a "non combustible" container 2. The container is made of a material "to withstand combustion." "When it is subjected to heat, the contents do not burn. They emit smoke out a perforation 10 fast enough so that the smoke does not burn.

This is opposite teaching from applicant's claimed structure and function, since applicants container has a "bottom portion constructed of a material that vigorously supports combustion". In fact, as it burns away, the material inside burns. Whereas the material inside Green never burns.

In the office action, claims 6-9 and 11-14 were rejected under 35USC 103(a) as being obvious over US patent to Green in view of choice of material being well known.

It is respectfully submitted that the application is improperly rejected for want of a prima facie showing of obviousness.

It is respectfully submitted that the invention as claimed is unobvious over the prior art for the following reasons:

Since Green does not contain the claimed elements, and the material of construction determines the function, it is unobvious to change the material of Green so that it no longer functions as Green intended.

No teaching nor suggestion is made of altering Green to conform to applicant's claimed structure and function. Claimed elements are absent from the combination proposed by the examiner:

Applicant's claim elements could not function with the proposed prior art combination, since a non-combustable chamber would not cause the contents to ignite

These are evidences of unobviousness.

If the prior art structure were somehow modified to applicant's claimed operation, it would no longer function as intended by Green.

Since the prior art combination lacks elements of the claims, is opposite teaching, and does not function as intended, it is therefor unobvious. In re Clinton, 527 F. 2d, 188 USPQ365 (CCPA 1976)

The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on Applicant's disclosure. In re Vaeck, 947 F.2d 488, USPQ 2d 1438 (Fed.Cir. 1991).

If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious. In re Ratti, 270 F.2d 810, 123 USPQ 349 (CCPA 1959).

The showing of suggestion to combine must be clear and particular. Examiner has made no such showing. In re Dembiczak, 175 F.3d 994, 50 USPQ 2d. 1614 (Fed. Cir.1999).

In view of the foregoing, it is urged that the Examiner withdraw the rejections and allow the claims. If there are any comments, questions or suggestions to be made, the Examiner is respectfully invited to telephone the applicant's representative at the telephone number given below for prompt disposition of any still outstanding matters.

Reconsideration is respectfully requested.

Respectfully submitted,  
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